EVIDENCE -- DISCOVERY -- *WILLITS* -- State generally has no duty to seek out or develop potentially exculpatory evidence Revised 8/2001

To be entitled to a *Willits*[(1)] instruction, a defendant does not have to prove that evidence destroyed by the State would have conclusively established his defense. *State v. Hunter*, 136 Ariz. 45, 51, 664 P.2d 195, 201 (1983); *State v. Walters,* 155 Ariz. 548, 551, 748 P.2d 777, 780 (App. 1987). The defendant need only show that if the evidence had not been destroyed, it might have tended to exonerate him. *State v. Hunter, id*. Accordingly, defendants often claim that the State acted in bad faith in failing to preserve evidence that *might* have been exculpatory. But the duty of police to preserve potentially exculpatory evidence arises only when the evidence is "obviously material." *State v. Perez*, 141 Ariz. 459, 463, 687 P.2d 1214, 1218 (1984); *State v. Tinajero,* 188 Ariz. 350, 355, 935 P.2d 928, 933 (App. 1997). The *Tinajero* Court explained:

> This requirement reflects the due process standard of "constitutional materiality" that governs the preservation of evidence. *See State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App.1987). To be constitutionally material, "[e]vidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id*. (*quoting California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984))(emphasis added).

State v. Tinajero, 188 Ariz. 350, 355, 935 P.2d 928, 933 (App. 1997). Although the State has a duty "to preserve evidence that is obvious, material and reasonably within its grasp," *State v. Tyler*, 149 Ariz. 312, 317, 718 P.2d 214, 219 (1986), the State ordinarily has no affirmative duty to seek out and develop exculpatory evidence. *State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987). As the Court of Appeals stated in *State v. Turrubiates*, 25 Ariz.App. 234, 240, 542 P.2d 427, 443 (1975), the appellate courts "will not, by judicial fiat, require the police to expend valuable time searching for

exculpating evidence when they have developed a sufficient case against an accused." Nor is their any "constitutional duty to perform any particular tests." *Arizona v. Youngblood*, 488 U.S. 51, 59, 109 S.Ct. 333, 338, 102 L.Ed.2d 281 (1988). For example, in *State v. Berryman*, 178 Ariz. 617, 875 P.2d 850 (App.1994), the defendant was convicted of possessing a prohibited weapon. On appeal, he contended that the police had a duty to test the gun for operability, because a permanently Inoperable gun was excluded from the definition of a prohibited weapon. The defendant concluded that he should have received a *Willits* instruction that since the State had not tested the gun, the jury should infer that if they had tested the gun, it would have been shown to be inoperable. The Court of Appeals disagreed, holding that because the defendant bore the burden of proving the existence of any statutory objection, "the police were not obligated to acquire evidence to help him do so." Therefore, "The fact that the officers had not tested the weapon nor sought to determine registration did not call for a *Willits* instruction." *State v. Berryman*, 178 Ariz. 617, 622, 875 P.2d 850, 855 (App. 1994)

1. *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964)